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No. 94-992

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOU-HAN, INC., a Florida Corporation,
Petitioner,

v.

THE CITY OF ST. PETERSBURG
A Florida Municipal Corporation,
and ROBERT BUTTERWORTH,
the Attorney General of the State of Florida,

Respondents.

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

I. Whether an applicant for a variance from a zoning regulation, is entitled, under the Constitution of the United States, to a fair and impartial tribunal in a quasi-judicial/administrative action before a municipal board.

LIST OF PARTIES

Petitioner, Dou-Han, Inc., is a Florida Corporation doing business in Pinellas County, Florida. Respondent, the City of St. Petersburg, is a Florida Municipal Corporation. Respondent, Robert Butterworth is the Attorney General of the State of Florida.

Neither party has any parent or subsidiary corporation as contemplated by Rule 29.1, involved herein.

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STATEMENT OF THE CASE

The parties are in general accord with respect to the facts of the case, however, Petitioner would point out that adult use variances are the only variances from the City of St. Petersburg Zoning Ordinance which are heard by the City Council and not the Board of Adjustment.

The language of "closing a loophole," used as the explanation for modifying the body to hear any variance applications, is a verbatim quote of the Mayor, and thus is not a conclusion, but a statement of fact. If it is factually disputed, then the City's Motion to Dismiss should have been denied. *Conley v. Gibson,* 355 U.S. 41, (1957).

SUMMARY OF ARGUMENT

There is a constitutional mandate for a fair and impartial tribunal to hear applications for variances from zoning regulations. Petitioner was entitled to a declaratory judgment setting forth its rights, and was not required to exhaust its administrative remedies. This issue was squarely before the trial court (Petition for Writ of Certiorari, p. A-14,).

REPLY ARGUMENT

There is a constitutional mandate for a process by which variances from zoning regulations may be granted: *see, e.g. Reynolds v. Zoning Board of Review of Town of Lincoln,* 191 A.2d 350 (R.I. 1963); *Bieger v. Village of Moreland Hills,* 209 N.E.2d 218 (Oh. Int.App. 1965); *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535. (D.C. App. 1972); and *Bouley v. City of Nashua,* 205 A.2d 38 (N.H. 1964), citing: *Nectow v. Cambridge,* 277 U.S. 183, 188, (1928).

This Honorable Court recently decided the issue of the need to exhaust administrative remedies in cases brought under 42 U.S.C. § 1983: *Howlett v. Rose,* 496 U.S. 356 (1990), a case arising from the very same jurisdiction as the instant case. Under *Howlett,* Petitioner had no need to exhaust its administrative remedies before commencing this action.

Finally, Petitioner is entitled, as a matter of federal constitutional law, (as well as Florida statutory law,) to the entry of a declaratory judgment in this action, and this action is not premature in these circumstances: *Railroad Transfer Service, Inc. v. the City of Chicago,* 386 U.S. 351 (1967).

Accordingly, Respondents' arguments are without merit, and this Honorable Court should address this important federal question.

CONCLUSION

This Court has ruled, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* _____ U.S. _____, 113 S.Ct. 2264 (1993), that, as a matter of due process of law, a quasi-judicial process must be conducted by fair and impartial tribunal. This Court has further held that post-hearing remedies are constitutionally inadequate.

Accordingly, the lower courts erred in dismissing the Complaint herein. Because so many land use decisions are now being made in a quasi-judicial fashion, the question presented herein is of paramount importance throughout the country, and requires a decision by this Honorable Court.

Respectfully submitted,

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